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Supreme Court of the United States

OCTOBER TERM, 1955

Docket No. 456

LASKEY BROS. OF W. VA., INC., *Petitioner-Plaintiff,*

and

ARNOLD MALKAN, *Petitioner,*

against

WARNER BROS. PICTURES, INC. (in Dissolution), WARNER BROS. PICTURES INC. (Delaware), WARNER BROS. PICTURES DISTRIBUTING CORPORATION, STANLEY WARNER MANAGEMENT CORPORATION, STANLEY WARNER CORPORATION, RKO RADIO PICTURES, INC., RKO PICTURES CORPORATION, RKO KEITH-ORPHEUM THEATRES, INC., RKO THEATRES CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION (In Dissolution), TWENTIETH CENTURY-FOX FILM CORPORATION (Delaware), UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., LOEW'S, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, PARAMOUNT PICTURES, INC. (In Dissolution), PARAMOUNT PICTURES CORPORATION, COMERFORD THEATRES, INC., COMERFORD PUBLIX THEATRES CORP., FABIAN THEATRES CORP., JAMESTOWN AMUSEMENT CO., INC., SHEA ENTERPRISES, INC., KALLETT THEATRES, INC., METROPOLITAN PLAYHOUSES, INC., SCHINE CIRCUIT, INC., SKOURAS THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, ALLIED ARTISTS PICTURES CORP., REPUBLIC PICTURES CORP., UNITED ARTISTS CORPORATION, UNITED ARTIST THEATER CIRCUIT, INC., ALLIED ARTISTS DISTRIBUTING CORPORATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARNOLD MALKAN,
of Counsel.

BRUNO SCHACHNER,
Attorney for Petitioners.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Laskey Bros. of W. Va., Inc. and its attorney, Arnold Malkan, pray that a writ of certiorari

issue to the United States Court of Appeals for the Second Circuit for review of so much of the judgment of that court filed July 13, 1955 in the above captioned cause as disqualified petitioner Malkan from representing the petitioner-plaintiff in this case.

Opinions Below

The opinion of the Court of Appeals has not yet been officially reported. It has been unofficially reported in 1955 Trade Cases, par. 68,103. The opinion of the District Court has been reported at 130 F. Supp. 514.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1). The judgment of the Court of Appeals was entered July 13, 1955.

Question Presented

May an attorney be enjoined from representing a party whom his former firm had represented, solely by reason of the disqualification of the attorney's former partner?

Statutes Involved

Rules of the United States District Courts for the Southern and Eastern Districts of New York (Effective March 1, 1952, 16 F. R. S. 906, 908):

"RULE 5: DISCIPLINE OF ATTORNEYS.

* * * * * * *

(c) Professional misconduct shall include * * * a failure to abide by the provisions of the Canons of Ethics of the American Bar Association or of the New York State Bar Association."

The Canons of Ethics of the American Bar Association:

"CANON 6. ADVERSE INFLUENCES AND CONFLICTING INTERESTS.

* * * * * *

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

Statement of the Case

The Court below enjoined petitioner Malkan and his law firm of Malkan & Ellner from representing the petitioner-plaintiff in this case, on the basis of Malkan's prior partnership with one Isacson.

Malkan's former firm, Malkan & Isacson, had been counsel to plaintiffs in motion picture antitrust actions, including one substantially the same as the instant case and another case, *Fisher Studios, Inc.* v. *Loew's, Inc., et al.* (E. D. N. Y. 1952). Soon after the *Fisher Studios* case was commenced, the defendants therein moved to disqualify Messrs. Malkan and Isacson individually and as a firm from representing the plaintiffs in that case. The Court refused to disqualify Malkan individually, but disqualified Mr. Isacson and the firm of Malkan & Isacson from representing the plaintiffs in that case. The Court said that in the course of Mr. Isacson's former employment by a firm that had represented some of the *Fisher* defendants he had had access to "confidential" information pertaining to 16 mm. motion picture distribution that would be useful in that lawsuit. 1954 Trade Cases, par. 67,725 at pp. 69, 337-8.

Thereafter, the firm of Malkan & Isacson was dissolved, and Malkan entered into a new partnership with Mr. Ell-

ner. The plaintiff-petitioner in the instant case retained the new firm to represent it in its suit then pending in the Western District of Pennsylvania. Malkan had never before known the facts, since at the time suit was filed he was wholly occupied with other litigation (103a; 82a). He examined the complaint pending in Pennsylvania and concluded that it was insufficient in many respects and omitted many defendants which should have been joined. Accordingly, on November 6, 1954 Malkan's new firm filed the instant suit, as well as a suit on behalf of another plaintiff against virtually the same defendants: *Austin Theatre, Inc.* v. *Warner Bros. Pictures, Inc., et al.*

In both cases the plaintiffs and the new firm promptly moved for an order holding the firm qualified (16-19a), and defendants cross-moved to enjoin Malkan & Ellner's representation of the plaintiffs (20-53a). Both cases were considered in the same opinion by the District Court, 130 F. Supp. 514, and were consolidated for appeal.

Affirming the District Court, the Court of Appeals (Ryan, D. J. dissenting in part) held that Malkan & Ellner were qualified to represent the plaintiff in *Austin Theatre* and in any other case that might come to Malkan & Ellner after the firm of Malkan & Isacson was dissolved, because:

> "* * * Malkan has successfully met the burden of rebutting the inference that he received confidential information from Isacson." 1955 Trade Cases at p. 70,581.

Despite his lack of confidential information, Malkan and the firm of Malkan & Ellner were held not qualified to proceed with the instant case, solely because the plaintiff herein was formerly a client of the dissolved firm of Malkan & Isacson.

Respondents have advised the District Court that they will promptly petition for certiorari in the *Austin Theatre* case.

Reasons for Granting the Writ

1. The doctrine of disqualification of an attorney by reason of his prior representation of the adverse party has been dangerously extended in recent years with no opportunity for this Court to preserve the rights of members of the Bar. Until recent years the harsh remedy of disqualification of an attorney was reserved for the rare instances in which it seemed necessary to protect a former client from the threat of misuse of confidential information acquired by his former attorney.

Currently, however, antitrust defendants have seized upon disqualification proceedings as a new weapon to delay and defeat plaintiffs. They began with a strong case in which a young attorney undertook to represent a plaintiff theatre owner in an antitrust suit after working eight years for a large New York City law firm representing Twentieth Century-Fox Film Corporation. *Consolidated Theatres, Inc.* v. *Warner Bros. Circuit Management Corp.*, 2 Cir., 216 F. 2d 920. That case elicited widespread interest in the profession, although on its facts disqualification seemed to be justified. Commentators pointed out the danger that disqualification proceedings might easily be abused. See 64 Yale Law Journal 917, 928 (May 1955), Note, Disqualification of Attorneys for Representing Interests Adverse to Former Clients; 68 Harvard Law Review 1084, 1085-6 (April 1955), Note on *Consolidated Theatres* case, *supra;* 6 Syracuse Law Review 360, 362 (Spring 1955), Note, Attorney Disqualified Where Past Legal Association Results in Conflict of Interest. The possibilities of abuse are increased by the Court of Appeals' view that no specific showing of confidential information is required.

Citing the Yale Law Journal note, *supra,* in the instant case the Court of Appeals, per Chief Judge Clark, pointed out that:

> "* * * young lawyers might seriously jeopardize their careers by temporary affiliation with large law firms. But even more important is the effect on litigants who may seriously feel they have claims worthy of judicial testing, but are prejudiced in securing proper representation. For the net effect of an overharsh rule of disqualification must be to hinder adequate protection of clients' interests in view of the difficulty in discovering technically trained attorneys in specialized areas who were not disqualified, due to their peripheral or temporally remote connections with attorneys for the other side." 1955 Trade Cases, par. 68, 103 at p. 70,581.

The motion picture companies promptly acted to extend the *Consolidated Theatres* decision. They made several motions, which were denied in unreported decisions, to stay or disqualify the former partner of the young man who had been dsiqualified there. In another case, they attacked four other attorneys, but gained only a minor victory against one. *T. C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S. D. N. Y. 1953).

2. The new rule of vicarious disqualification announced in the instant case poses a much greater threat to members of the Bar than did the *Consolidated Theatres* decision, *supra*. That case penalized a young attorney only for the work that he himself had done in his former employment. The instant rule permanently penalizes any other attorney who, however innocently, gives an opportunity to the attorney who has come from a large firm and who may subsequently be found disqualified. The result would be to impair the freedom and professional advancement of countless attorneys.

The danger that lurks in forming any partnership is illustrated by this very case. Isaeson's former employment, which led to his disqualification, had terminated a year and a half before he became Malkan's partner. When the now dissolved firm of Malkan & Isaeson was formed, Malkan understood that Mr. Isaeson had never handled antitrust matters for his former employers (112a). Hence

Malkan could not have anticipated Isacson's disqualification. Yet Malkan is now *irremediably* tainted with the disqualification that Isacson incurred in an employment that terminated long before he met Malkan.

3. The doctrine of vicarious disqualification is spreading fast. Another illustration is *United States* v. *Standard Oil Co. (N. J.) et al.* (S. D. N. Y. 1955, Civil No. 78-154). There the Government moved to disqualify the entire firm of Sullivan & Cromwell because one of its youngest partners had worked on oil matters for the Government before he became a partner. The motion, argued on or about September 28, 1955 is now under consideration by Judge Irving Kaufman.

The motion foreshadows serious impairment of future opportunities for employment of attorneys in the Government. Evidently, the Government will claim its full rights as a former client instead of relying upon the more specific and limited "conflict of interest" legislation and regulations.

4. The rule of disqualification announced below confers no legitimate benefit to the defendants-respondents and causes needless hardship to petitioners. There is no possible justification for depriving a party of counsel of his choice when such counsel possesses no potential for illegitimate harm. Without confidential information, petitioner Malkan can do the defendants no injury, and their position is no worse than if the plaintiff had engaged any other attorney.

These circumstances call for application of the basic equity rule that a party may obtain an injunction only to prevent an anticipated injury. *United Fuel Gas Co.* v. *Railroad Commission,* 278 U. S. 300, 310.

5. Although the precedents in this field were limited, all of them were contrary to the decision below and uniformly held that the drastic measure of disqualification of an attorney is proper only when some mischief can reasonably be anticipated from his representation in the particular case.

In well-reasoned opinions the British Court of Appeal unanimously permitted a solicitor to appear in a case in which the partner was disqualified. *Rakusen* v. *Ellis, Munday & Clarke,* 1 Eng. Rep. 831 (Court of Appeal, Ch. Div., 1912). Lord Justice Moulton (at p. 841) based his conclusion on the fact that no mischief could arise from the appearance of the partner in whom no confidences had been reposed. For the same reason Lord Justice Buckley (at p. 842) rejected the proposition that disqualification "extends to the partner (who knows nothing of the matter) of the solicitor who from his previous employment does know something."

Accord: *Johnson* v. *Morris,* 27 Ga. App. 463, 108 S. E. 810 (1921). Opinion 793, Committee on Professional Ethics of the Association of the Bar of the City of New York (reprinted in the Appendix hereto, p. 9).

Cf. Hawley v. *Hawley,* D. C. C. A., 114 F. 2d 745, 750.

Harvey v. *Harvey,* 202 Wis. 553, 561-2, 231 N. W. 580, 583.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

Bruno Schachner,
Attorney for Petitioners.

Arnold Malkan,
of Counsel.

APPENDIX

November 5, 1941

No. 793

In a personal injury action by an infant injured by a truck, B., of the firm of A. & B., represented a grocery concern whose employee operated the truck, and T. was engaged as trial counsel by the attorneys who represented a used car concern, co-defendant. On plaintiff's examination before trial of the grocery concern, its president testified that the truck was owned by the used car concern, and B., as attorney for the grocery concern, produced a bill of sale dated after the accident. Subsequently, B. withdrew from the firm of A. and B. and formed a partnership with T. B. did not thereafter act for the grocery concern. T. personally continued to act as trial counsel for the attorneys representing the used car concern, but neither B. nor the firm of T. and B. participated. On the trial, T. contended that the used car concern had passed title prior to the accident and that the above-mentioned bill of sale was a forgery.

Was it professionally proper for T. to continue to act as trial counsel after forming the partnership with B.?

OPINION

As regards plaintiff, whose attorney is the inquirer, the Committee sees no impropriety in the mere continuance of T. as trial counsel after formation of the partnership with B.

Considering the question broadly, there appears to have been a conflict of interest between the grocery concern and the used car concern. In view of B.'s representation of the grocery concern, it would have been unethical for him, so long as the conflict continued, to represent the used car

concern either as attorney or as trial counsel (Old Opinion No. 4—Pamphlet No. III), without consent after full disclosure, and this disqualification has been held to extend to a firm of which B. was a member (Old Opinion No. 2—Pamphlet No. III). But if neither B., nor the firm of T. and B. as such, acted for the used car concern, the Committee is of opinion that the mere fact that T. and B. entered into a partnership, would not of itself make it improper for T. to continue to act personally as trial counsel for the firm defending the used car concern.

Of course, it would be improper for B. to disclose confidential information to T. or for T. to make use of such confidential information (A. B. A. Canons 6 and 37).

NOV 10 1955
HAROLD B. WILLEY, Clerk

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—against—

WARNER BROS. PICTURES, INC. (in Dissolution), *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

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November 9, 1955.

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No. 456

BRIEF FOR RESPONDENTS

Respondents pray that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit be denied. That judgment unanimously affirmed an order of the United States District Court for the Southern District of New York, that Arnold Malkan, J. Robert Ellner and Malkan & Ellner were disqualified to act as attorneys for petitioner-plaintiff (135a-137a).*

*References are as follows:

"R"—to the pages of the original papers in the Court of Appeals;

"a" following a page number—to petitioners' printed appendix in the Court of Appeals;

"b" following a page number—to respondents' printed appendix in the Court of Appeals;

"Rep"—to the Special Master's Report in *Fisher.*

Questions Presented

Where an attorney, Malkan, forms a partnership with an attorney, Isacson, who had received confidential information from motion picture companies while representing them in antitrust cases, and the firm of Malkan & Isacson, until disqualified, held out such confidential information as "bait" in soliciting theatres to bring treble damage actions against such motion picture companies through that firm, and commenced at least seven such treble damage actions:

1. May Malkan, simply by dissolving the disqualified firm of Malkan & Isacson, represent a treble damage plaintiff in an action against such motion picture companies where such plaintiff was formerly represented by that firm in a similar action?

2. May Malkan, simply by dissolving the disqualified firm of Malkan & Isacson, avoid the effect of a stipulation in which Malkan & Isacson agreed that disqualification in the action in which they stipulated would be controlling in like antitrust actions pending, or to be commenced, against the stipulating defendants?

Rules and Regulations Involved

In addition to Canon 6 of the Canons of Ethics of the American Bar Association, set forth in the petition, Canon 37 of such Canons is also involved in this case:

> "Canon 37. It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the dis-

closure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client."

Statement

This is a private antitrust action commenced in the Southern District in New York on November 6, 1954, on behalf of plaintiff by Malkan & Ellner, a law firm composed of Arnold Malkan and J. Robert Ellner, against 58 defendants, all of whom are engaged in the motion picture business. On the same day Malkan & Ellner brought a similar antitrust action against substantially the same defendants, also in the Southern District, entitled *Austin Theatre, Inc.* v. *Warner Bros. Pictures, Inc. (in Dissolution), et al.* Within seventeen days thereafter, on November 23, 1954, plaintiff in each action moved for an order that Malkan & Ellner was qualified to represent it in its action, and thereafter defendants cross-moved for an order disqualifying the firm of Malkan & Ellner and the members thereof (16a, 20a). District Judge Archie O. Dawson, in an opinion filed March 29, 1955, concluded that these attorneys were disqualified in this (*Laskey*) action but were qualified in the *Austin* action (123a-135a). Judge Dawson disqualified Malkan & Ellner and the members thereof in the *Laskey* action because plaintiff Laskey was a client of the disqualified predecessor firm of Malkan & Isacson before dissolution of that firm, but he refused to disqualify in the *Austin* action only because that plaintiff engaged Malkan for the

first time two months after the dissolution of the disqualified firm of Malkan & Isacson. The Court of Appeals unanimously affirmed Judge Dawson's decision in *Laskey* and, with one Judge dissenting, affirmed Judge Dawson's decision in *Austin* (91b).*

The basis of both the disqualification of Malkan in the *Laskey* action and of defendants' claim that Malkan must also be disqualified in the *Austin* action is found in disqualification proceedings which took place in another motion picture antitrust action now pending in the Eastern District of New York, entitled *Fisher Studios, Inc., et ano.* v. *Loew's, Inc., et al.* Plaintiffs in the *Fisher* action were represented by Malkan & Isacson, the predecessor firm of Malkan & Ellner, and extensive hearings were conducted before a Special Master on the qualification or disqualification of David H. Isacson and the firm of Malkan & Isacson to represent plaintiffs therein. In his Report filed August 19, 1953, the Special Master concluded that Isacson and the firm of Malkan & Isacson were disqualified to represent plaintiffs in that action by reason of (a) confidential information with respect to certain defendants therein gained by Isacson during the period of his employment by the law firm of Sargoy & Stein, which represented many of said defendants, and (b) solicitation engaged in by Isacson and by others on behalf of the firm of Malkan & Isacson holding out to those solicited the possession of confidential information which was used as "bait" in seeking retainers (Rep. 220-221; R. 377-378).

Prior to the formation of the partnership of Malkan & Isacson, Isacson had been associated with the law firm of

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*Respondents are filing a petition for a writ of certiorari in *Austin* simultaneously with the filing of this brief.

Sargoy & Stein from November, 1946 to March, 1951 (Rep. 31; R. 186). Sargoy & Stein and its predecessors have for many years acted as special counsel for numerous motion picture companies, including many of the companies which are defendants in *Fisher, Laskey* and *Austin* (Rep. 10-11; R. 166-167). It was at Sargoy & Stein that defendants' confidential and privileged information came to Isacson. With respect to Isacson's claim that he gained no such confidential information, the Special Master found:

> "The claim is utterly without foundation in the evidence, as has already been abundantly shown. The record demonstrates that he was regularly employed in important litigation involving antitrust aspects in a law office which was constantly gathering, classifying, and analyzing a great mass of highly confidential data relating to the motion picture industry, to all of which Mr. Isacson had access and much of which he actually saw and used.
>
> "Had Mr. Isacson been associated with an office which had numerous clients of all types, and had he been only occasionally employed on work for a motion picture company, the situation might be different. But Sargoy & Stein, practically speaking, did nothing but motion picture work. Their files contained nothing but data relating to the motion picture industry. If one set out with the avowed purpose of learning all he could about the legal aspects of the motion picture industry on the distribution side, it is hard to imagine an office where he could more readily do so than in Sargoy & Stein. Sargoy & Stein's files contained data not merely concerning one motion picture company or two or three, but virtually the whole industry." (Rep. 190-191; R. 347-348.)

There was ample evidence to support the Special Master. He found that during the period of Isacson's employ, Sargoy & Stein participated in the defense of 50 treble damage actions and handled 464 suits against exhibitors for percentage frauds or under-reporting, at least 233 of which had antitrust defenses or counterclaims (Rep. 32, 38, 167; R. 187, 194, 324); that Isacson worked on at least two straight treble damage cases (Rep. 39, 167; R. 195, 324) and that of the 233 percentage fraud or under-reporting cases with antitrust defenses or counterclaims, Isacson initialed or marked memoranda or correspondence in all 233; that he wrote letters or memoranda in 170 of them and participated in the taking of depositions in 72 of them (Rep. 32; R. 188); and that he expressly interrogated on anti-trust issues in two cases (Rep. 32, 168-172; R. 188, 325-329), which the Master described as a "representative sampling of the cases involving anti-trust issues in which Mr. Isacson participated" (Rep. 172; R. 329).

After Isacson's dismissal from Sargoy & Stein he unsuccessfully sought legal employment for 16 months and at one point attempted to rejoin Sargoy & Stein (Rep. 63-66; R. 219-222). Finally, Isacson was introduced to Malkan who had an equipped law office in operation and after several months of discussion the law firm of Malkan & Isacson was formed in July, 1952 (Rep. 67; R. 223). The Special Master found that it was indeed strange when a lawyer "who is out of employment for such a long period" could "suddenly blossom forth as an advocate in important anti-trust litigation" (Rep. 63; R. 219). In the Master's opinion, "the record shows that this unusual situation is explainable on the basis that Mr. Isacson finally decided to bolster his waning legal fortunes by placing upon the market the confidential information he had acquired while with Sargoy &

Stein" (Rep. 63-64; R. 219-220). Mr. Sargoy testified before the Special Master that Mr. Isacson came to him in the summer of 1952 stating "that he had a possibility of tying up with an anti-trust lawyer on a partnership basis, but that the arrangement was predicated upon Mr. Isacson's getting some clients who would undertake anti-trust actions against the motion picture distributors" (Rep. 64, 187; R. 220, 344).

At this point the firm of Malkan & Isacson entered upon a deliberate scheme, plan and campaign to peddle confidential information gained by Isacson during his employment by Sargoy & Stein. One basis of the Special Master's finding that Isacson and the firm of Malkan & Isacson were disqualified was that "Mr. Isacson solicited and stirred up the instant action" (Rep. 221; R. 379). The Special Master concluded that the "bait" in the solicitation campaign on behalf of Malkan & Isacson was Mr. Isacson's special knowledge of confidential data concerning motion picture companies (Rep. 185; R. 342) and "that all that was missing from Mr. Isacson's campaign was a neon sign" (Rep. 186; R. 343). Both the Special Master and District Judge Abruzzo expressly stated that Isacson's confidential information would be of "incalculable value" in preparing and trying a treble damage anti-trust case against the motion picture companies (Rep. 25; R. 181, 33b).

At least 65 announcements of the formation of Malkan & Isacson were sent out; some were sent to motion picture exhibitors "who were at that very time engaged in litigation with his [Isacson's] former clients" (Rep. 185; R. 342). Isacson admitted that he had sent, along with these cards, doctored photographs of an article appearing in the "Independent Film Journal", dated August 9, 1952, which stated originally that "David H. Isacson, formerly with the law firm of Sargoy & Stein, became associated with Arnold

Malkin, prominent New York attorney". Isacson doctored his photographs so that the word "anti-trust" was added before the word "attorney" and Malkan's name was spelled correctly. The words "Independent Film Journal" were also added in the photograph underneath the article in the newspaper. The Special Master's Report states "that the only reasonable conclusion is that the alteration in the newspaper item was made by Mr. Isacson or under his direction" (Rep. 89; R. 246). In one note to an attorney, who represented independent exhibitors, Isacson wrote that since his employ with Sargoy & Stein he had "come to see the light and have undertaken to represent exhibitors (the salt of the earth, God bless them)."

Mr. Malkan is linked to the campaign of solicitation not only by his partnership with Isacson but also by solicitation engaged in presumably on his behalf by a former client of his, Mr. William Phillips (33a-35a). The testimony by Mr. William Phillips before the Special Master reveals beyond question that he was engaged in soliciting motion picture antitrust actions on behalf of Malkan. If Malkan did not, in fact, instruct, direct or procure Mr. William Phillips to solicit antitrust actions, Malkan would have taken the witness stand in the *Fisher* disqualification proceedings to deny such facts, but Malkan did not testify.*

The vigor and success of the solicitation campaign conducted by Malkan & Isacson is best shown by the fact that that firm appeared as the attorneys of record or of counsel in a dozen cases involving antitrust claims against motion picture companies (36a-37a).

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*The inference is irresistible from the facts and from the failure of Malkan to appear as a witness that Mr. William Phillips was employed or requested by Malkan to solicit anti-trust actions. *Local 167, I. B. T.* v. *United States*, 291 U. S. 293, 298; *Mammoth Oil Co.* v. *United States*, 275 U. S. 13, 52).

During the pendency of the *Fisher* disqualification proceedings, the parties by their attorneys and the attorneys representing David H. Isacson and Malkan & Isacson entered into a stipulation, dated February 3, 1953, which was designed to avoid a multiplicity of disqualification proceedings in the numerous triple damage actions then pending in various district courts as well as in future actions. Paragraph 11 of said stipulation provides as follows:

> "11. If it shall be finally determined in this action that David H. Isacson and Malkan & Isacson are qualified or disqualified, and if such determination in this proceeding is that such qualification or disqualification embraces 35mm. antitrust actions, 16 mm. antitrust actions and under-reporting actions, such determination shall be binding upon David H. Isacson, Malkan & Isacson, and the defendants herein, in all cases involving 35 mm. antitrust actions, 16 mm. antitrust actions and under-reporting actions, including those hereinabove mentioned."

Both of the conditions set forth in the above-quoted paragraph 11 were met in the *Fisher* disqualification proceedings. The Special Master found that the disqualification of Malkan & Isacson embraced 35 mm. antitrust actions and this was adopted and confirmed by District Judge Abruzzo (Rep. 220; R. 377). By order filed April 13, 1954, Judge Abruzzo confirmed the Report of the Special Master and disqualified the firm of Malkan & Isacson in the *Fisher* action (39b).

Shortly after Judge Abruzzo disqualified the firm of Malkan & Isacson, that firm was dissolved and Malkan formed his new partnership with Ellner (126a). About two months thereafter the successor firm brought the *Austin* and *Laskey* actions in the Southern District of New York (1b, 2a).

Reasons for Denying the Writ

There is no substantial question, ethical or otherwise, raised by the petition and the decision below is in accord with established principles of legal ethics. All of the Federal Judges passing upon the question have unanimously held Malkan disqualified in this action because he was a partner in a law firm previously disqualified from proceeding against defendants in a similar action—*Fisher*. As District Judge Dawson put it, "Once the attorney was disqualified from handling the case, he remains disqualified". And the Court of Appeals confirmed this rule by stating: " . . . all authorities agree that all members of a partnership are barred from participating in a case from which one partner is disqualified." (95b-96b).

The petition seeks to substitute another case for this case by the citation of Law Review articles which are concerned with the fate of young lawyers in large law firms. The question of young lawyers in large law firms is completely extraneous. Malkan was the senior partner, if not the only real partner of a two-man law firm Malkan & Isacson.

The petition contends that Malkan did not realize that Isacson had done antitrust work during his association with Sargoy & Stein. The contention not only begs the question, since we are involved with a breach of ethics based on misuse of confidential information, but is belied by the record which demonstrates that it was Isacson's knowledge of the motion picture distribution business which led to the formation of Malkan & Isacson for the purpose of commencing law suits against Isacson's former clients in which such information is not only relevant and material but of "incalculable value". The decision in this case is clearly correct.

On the other hand, the propriety of the decision in the *Austin* case is open to serious question. For the reasons set forth in the petition in that case the decision there is a very unfortunate landmark in the field of legal ethics. It has the effect of condoning and providing easy escape from grevious unethical conduct by attorneys. *Austin*, therefore, is the case of great significance and vital importance to the Bar and public because it is the decision in that case, not *Laskey*, which emasculates previously established and recognized principles of legal ethics.

CONCLUSION

The petition for a writ of certiorari in this action should be denied.

November 9, 1955.

Respectfully submitted,

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